

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-1065 E

74-1065

P/S

IN THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GENERAL DOUGLAS MacARTHUR, SR. VILLAGE
INC., STATE OF NEW YORK, COUNTY OF NASSAU,
VILLAGE OF HEMPSTEAD, TOWN OF HEMPSTEAD,
SCHOOL DISTRICT, NO. 1, SADIE SCHWARTZ,
D. C. R. HOLDING CORP., HENRIETTA RAND,
MARTHA BARKUS and SHIRLEY HERSCHKOWITZ,

Defendants.

D. C. R. HOLDING CORP., HENRIETTA RAND,
MARTHA BARKUS, SHIRLEY HERSCHKOWITZ and
SADIE SCHWARTZ,

Defendants-Appellants.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-
APPELLANT, D. C. R. HOLDING CORP.



SCHIFFMACHER, CULLEN, POCHFORD & PARTNERS
Attorneys for Defendant-Appellant, D. C. R. Holding Corp.
98 Cotten Mill Road
Great Neck, New York 11021 516 462-7600

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GENERAL DOUGLAS MacARTHUR, SR.,
VILLAGE, INC., STATE OF NEW YORK,
COUNTY OF NASSAU, VILLAGE OF HEMPSTEAD,
TOWN OF HEMPSTEAD, SCHOOL DISTRICT NO. 1,
SADIE SCHWARTZ, D. C. R. HOLDING CORP.,
HENRIETTA RAND, MARTHA BARKUS and
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D. C. R. HOLDING CORP., HENRIETTA
RAND, MARTHA BARKUS, SHIRLEY
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REPLY BRIEF OF DEFENDANT-
APPELLANT D. C. R. HOLDING CORP.

Defendants-Appellants' arguments supporting their conten-
tion that they are not obligated to refund the monies advanced by
D. C. R. HOLDING CORP. and the other defendants-appellants, to

purchase the real estate tax liens of the municipalities
can be summarized as follows:

1. The common law doctrine of caveat emptor supports the position that defendants-appellants cannot recover their payments.

2. A party who mistakenly pays a tax voluntarily cannot recover the funds expended.

3. D. C. R. and the other defendants-appellants can recover the monies paid to purchase the tax liens only if there is an irregularity, error or illegality in the tax lien or sale and, finally

4. Defendants-Appellants had constructive notice of the existence and priority of plaintiff's mortgage.

The first two arguments are specious. The third argument ignores the provisions of Section 1464 RPTL upon which DCR relies to support its claim for a rebate. The fourth argument is as applicable to the municipalities as to the tax lien purchasers.

The common law on delinquent tax sales has been

completely superseded in New York by antithetical statutory procedures so that the doctrine of caveat emptor has no applicability except to demonstrate that the policy of the State of New York to protect the tax lien purchaser is contrary to common law.

The law regarding mistaken payment of taxes is also irrelevant to the case at bar because here there were no mistaken payments of taxes. In fact, no tax was paid at all and it is precisely because of this non-payment of real estate taxes that the tax liens on MacArthur's property were sold by the municipalities and purchased by defendants-appellants causing plaintiff to foreclose its mortgage and the ensuing litigation, including this appeal.

Defendants-Appellants have never contended that there was an error, illegality or irregularity which voided their tax liens. They admit that they had valid tax liens and because their liens are valid, they are, after the redemption period, entitled to a tax deed conveying title to the liened premises in fee simple to them. Since the

municipality cannot deliver that deed to defendants-appellants, who have fulfilled all the statutory requirements therefor, D. C. R. and the other tax lien purchasers are entitled to reimbursement of the monies they advanced to purchase the tax liens. It is well to note here that alternative relief is available to the tax lien purchasers. They could commence an action for specific performance of the statutory obligation to convey the liened premises which is imposed on the Village by §1464 RPTL. This also would result in the tax lien purchasers receiving, in effect, a refund, because when it is impossible for one of the parties to perform specifically the obligation cast upon him by law to convey a parcel of real estate, the other party is entitled to damages. Maurer v. Albany Sand & Supply Co., 40 A. D. 2d 44, 337 N. Y. S. 2d 44 (App. Div. 3rd Dept. 1972) and cases there cited.

The municipalities excuse their inability to convey title to MacArthur's property to the tax lien purchasers with the assertion that DCR and the other defendants-appellants had constructive notice of plaintiff's

recorded mortgage at the time they purchased the tax liens and having that knowledge they are bound by the consequences. That argument cuts two ways, because the municipalities are charged with the same notice of plaintiff's mortgage when they offered the tax liens for sale as are the tax lien purchasers. Even though the municipalities were aware that their tax liens did not have the priority that would enable them to convey title to the property in fee simple to the tax lien purchasers after the redemption period, they went ahead and sold the tax liens. They now seek to profit from their misrepresentations as to the status of the tax lien at the expense of the tax lien purchasers.

DCR's brief on this appeal (pp22-23) explains why title to property encumbered by a tax lien is not searched before a prospective purchaser bids at the tax sale. The legislature of the State of New York, recognizing the practical impossibility of either the municipality or the tax lien purchaser conducting such a search, designed delinquent tax sale legislation to protect the lien purchaser

in the event the tax lien he purchased was inferior or defective so that by having tax liens quickly and easily marketed the municipalities could realize otherwise lost revenue with minimal delay and inconvenience.

The arguments of the municipalities are insubstantial and irrelevant. The judgment of the District Court should be reversed.

Dated: May 16, 1974

Respectfully submitted,

SCHIFFMACHER, CULLEN, ROCHFORD & FARRELL
Attorneys for defendant-appellant, D. C. R. Holding Corp.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

-against-

GENERAL DOUGLAS MacARTHUR, SR. VILLAGE, INC.
STATE OF NEW YORK, COUNTY OF NASSA, VILLAGE
OF HEMPSTEAD, TOWN OF HEMPSTEAD, SCHOOL
DISTRICT NO.1. SADIE SCHWARTZ, D.C.R. HOLDING
CORP., HENRIETTA RAND, MARTHA BARKUS and
SHIRLEY HERSCHKOWITZ,

Defendants.

AFFIDAVIT
OF SERVICE
BY MAIL

D.C.R. HOLDING CORP., HENRIETTA RAND, MARTHA
BARKUS, SHIRLEY HERSCHKOWITZ and SADIE
SCHWARTZ,

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Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
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STATE OF NEW YORK)
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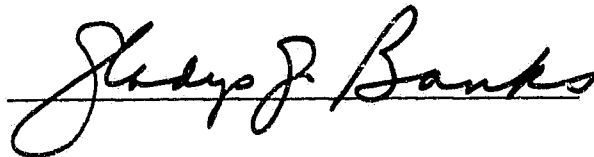
JOHN M. FARRELL, JR., being duly sworn, deposes and says:
that deponent is not a party to this action, is over the age of 18 years and
resides at 145 North Woods Road, Manhasset, New York.

That on the 22nd day of May, 1974 deponent served two copies of
the within REPLY BRIEF OF DEFENDANT-APPELLANT, D.C.R.
HOLDING CORP., upon Edward John Boyd, V., Esq. United States
Attorney, 225 Cadman Plaza, Brooklyn, New York; Joseph Jaspán, Esq.

County Attorney, Nassau County Executive Building, Mineola, New York; Saul Horowitz, Esq., 250 Fulton Avenue, Hempstead, New York; John O'Shaughnessy, Hempstead Town Hall, Main Street, Hempstead, New York; Gilbert Henoch, Esq. 320 Fulton Avenue, Hempstead, New York; Stanley Beals, Esq. 380 North Broadway, Jericho, New York and Michael P. Gurlides, Esq. 194 Old Country Road, Mineola, New York 11501, the attorneys for the respective parties in this action, these being the addresses designated by said attorneys for that purpose by depositing a true copy of the same enclosed in a post paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York, at 5:00 P. M.


JOHN M. FARRELL, JR.,

Sworn to before me this
22nd day of May, 1974



GLADYS G. BANKS
Notary Public, State of New York
No: 30-3169400 Nassau County
Comm. Expires March 30, 1976